Supreme Court, U.S.
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90 No. 1557

IN THE

Supreme Court of the United States

OCTOBER TERM, 1990

LEWIS NOVOD,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF
APPEALS FOR THE SECOND CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

I) Whether the Second Circuit's application of Section 3E1.1. of the United States Sentencing Guidelines imposed an unconstitutional penalty on Petitioner's right to assert his privilege against self-incrimination under the Fifth Amendment to the United States Constitution?

II) Whether Petitioner was deprived of his Sixth Amendment right to be tried "by an impartial jury of the State and district wherein the crime shall have been committed . . ."? U.S. Const. amend. VI.

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NO. _____

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1990

LEWIS NOVOD,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF
APPEALS FOR THE SECOND CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

Petitioner, Lewis Novod, respectfully prays that a writ of certiorari issue to review the opinion of the United States Court of Appeals for

the Second Circuit issued on January 17, 1991 and modified by Petition for Rehearing on March 11, 1991.

OPINIONS BELOW

The United States District Court for the Southern District of New York entered judgment of conviction in this case on December 5, 1989 for conspiracy to commit wire and mail fraud, mail fraud, wire fraud and perjury before a federal grand jury. (Appendix C) The Court of Appeals for the Second Circuit reversed Mr. Novod's convictions for mail and wire fraud on January 17, 1991, (Appendix B), and, on March 11, 1991, on petition for rehearing, the Court of Appeals reversed the conspiracy conviction, leaving intact only the conviction for perjury. (Appendix A) The Court of Appeals' decisions are

reported at United States v. Sacco, 923 F.2d 970 (2d Cir. 1991) and United States v. Sacco, 1991 WL 31187, No. 1179, 90-1002 (2d Cir. March 11, 1991), respectively.

JURISDICTION

The opinion of the Court of Appeals for the Second Circuit was entered on January 17, 1991 and modified by rehearing on March 11, 1991. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1) (1991).

STATUTES INVOLVED

This Petition involves Section 3E1.1. of the United States Sentencing Commission Guidelines (1990) as amended January 15, 1988 and as in effect currently and at the time of Mr. Novod's

sentencing. Section 3E1.1. provides in relevant part:

> Acceptance of Responsibility
>
> If the defendant clearly demonstrates a recognition and affirmative acceptance of personal responsibility for his criminal conduct, reduce the offense level by 2 levels.

U.S.S.G. § 3E1.1. (1990).

This Petition also involves the Fifth and Sixth Amendments to the United States Constitution, which provide as follows:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness

> against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

U.S. Const. amend. V (emphasis added).

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense.

U.S. Const. amend. VI (emphasis added).

STATEMENT OF THE CASE

On September 26, 1989, a jury in the Southern District of New York convicted Lewis Novod, Petitioner herein, of one count of conspiring to commit wire and mail fraud in violation of 18 U.S.C. § 371, six counts of mail fraud in violation of 18 U.S.C. § 1341, seven counts of wire fraud, in violation of 18 U.S.C. § 1343, and seven counts of perjury before a federal grand jury, in violation of 18 U.S.C. § 1623. (See Appendix C) The trial jury was composed of eleven jurors residing in the Southern District of New York and one resident of the Northern District of New York.

On December 14, 1989, the Honorable Vincent L. Broderick, U.S.D.J., sentenced Mr. Novod to ten months in prison, to be followed by three years

supervised release, during the first six months of which Petitioner was to be confined to his home.

Petitioner exercised his right to appeal pursuant to 28 U.S.C. § 1291 (1991). The Court of Appeals, in an opinion dated January 17, 1991, reversed Mr. Novod's convictions for mail and wire fraud on legal grounds and affirmed his convictions for perjury and conspiracy. The Second Circuit held, however, that Novod had waived the right to challenge the empanelment of a juror from outside the district. The Court did not therefore consider on the merits Novod's assertion that he had been denied his constitutionally guaranteed right to trial by a jury from the district in which the crime was committed. (Appendix B)

Mr. Novod subsequently filed a petition for rehearing with the Circuit Court on January 30, 1991. The Court of Appeals granted Novod's petition for rehearing, reversing the conspiracy conviction in an opinion dated March 11, 1991. (Appendix A)

In that opinion, the Court of Appeals refused to remand the case for resentencing to allow Novod the opportunity to accept responsibility pursuant to Section 3E1.1. of the Federal Sentencing Guidelines.[1]

Petitioner Novod challenges the decisions of the Court of Appeals for the Second Circuit denying remand of the case for a resentencing hearing and rejecting Petitioner's claim of abridgement of his Sixth Amendment right to be tried by a

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[1] U.S.S.G. § 3E1.1. (1990).

jury of the state and district where the crime was committed.

The decision of the Second Circuit applies § 3E1.1. of the United States Sentencing Guidelines so as to penalize a defendant's choice not to incriminate himself at the sentencing stage. There is no legitimate reason to allow a defendant the opportunity to acknowledge his wrongdoing and seek § 3E1.1.'s two level reduction before and even after trial, but to deny a defendant preservation of the same opportunity throughout his appeal.

In addition, Petitioner Novod's trial was not in accord with his Sixth Amendment rights. Petitioner challenges the empanelment of a juror from outside the Southern District of New York as a violation of his Sixth Amendment right to a trial "by an impartial jury of the

State and district wherein the crime shall have been committed . . ." U.S. Const. amend VI (emphasis added).

During voir dire, one of the jurors stated that she resided in Ulster County. Ulster County is in the Northern, not the Southern District of New York. Neither Petitioner's counsel, the prosecutor, nor the District Judge realized that Ulster County was not part of the Southern District at that time. It was not until Judge Broderick had almost completed his charge to the jury that the government's case agent stated, in response to a general question by the Court having nothing to do with the residence of the jurors, that Ulster County was in the Northern District of New York. (Trial Record, 1128) The matter was not addressed again thereafter.

Petitioner asserts that the right to a trial by a jury composed of jurors from the Southern District of New York is a fundamental constitutional right which could only have been given up by an explicit on-the-record waiver.

REASONS FOR GRANTING THE WRIT

I.
THE SECOND CIRCUIT'S APPLICATION OF SENTENCING GUIDELINES SECTION 3E1.1. SO AS TO DEPRIVE Petitioner OF THE OPPORTUNITY TO REDUCE HIS SENTENCE BY ACCEPTING RESPONSIBILITY FOR HIS OFFENSE AFTER EXHAUSTION OF HIS APPELLATE REMEDIES UNCONSTITUTIONALLY BURDENED PETITIONER'S EXERCISE OF HIS FIFTH AMENDMENT PRIVILEGE AGAINST SELF-INCRIMINATION

Section 3E1.1. of the United States Sentencing Guidelines[2] provides that a defendant who "clearly demonstrates a recognition and affirmative acceptance of personal responsibility for his criminal conduct" is entitled to a two level reduction in his offense level. That adjustment will very frequently result, as it could have

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[2] U.S.S.G. § 3E1.1. (1990).

in Petitioner's case,[3] in a substantial

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[3] A two level reduction in this case would allow Judge Broderick to sentence Mr. Novod to home detention or other community confinement without any period of imprisonment.

Contrary to the Second Circuit's comment in its opinion on rehearing, (Appendix A-14), there is a sound basis for believing that Judge Broderick would impose a lower sentence on Mr. Novod when considering only the perjury conviction on remand. Even though Petitioner did not seek to "accept responsibility" because he was exercising his right to appeal, the trial judge stated that Petitioner's remarks at the sentencing and those of his counsel caused the judge to reduce the sentence by almost one-half of what he had originally contemplated. (Trial Record, 1219) Additionally, Judge Broderick discussed the substantial questions that might be raised on appeal with regard to the mail and wire fraud and conspiracy convictions. (Trial Record, 1225) In this context, he stated that: "[i]f those questions are decided favorably to the defendant, it will have an impact which will either be reversal or an order for a new trial, or a non-custodial sentence, or a reduced sentence." (Trial Record, 1225, emphasis added)

reduction in prison time.[4]

In this case, the Court of Appeals for the Second Circuit denied Petitioner the opportunity to exhaust his appellate rights before "accepting responsibility." The Court held:

> Nothing prevented [Petitioner Novod] from demonstrating 'a recognition and affirmative acceptance of personal responsibility' for his false grand jury testimony. Novod never acknowledged his participation in the [fraud] scheme . . . .

(Appendix A-13, emphasis added).

The Court of Appeal's decision ignored the fundamental proposition that as Petitioner faced sentence after trial,

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[4] The "Application Notes" in effect at the time of Petitioner's sentencing stated that "[c]onviction by trial does not preclude a defendant from consideration under this section." However, the Application Notes are not binding. E.g., United States v. Watt, 910 F.2d 587, 591 (9th Cir. 1990).

he retained his Fifth Amendment privilege against self-incrimination with respect to the very subjects on which he had been convicted. Taylor v. Best, 746 F.2d 220, 222 (4th Cir. 1984), cert. denied, 474 U.S. 982 (1985) (defendant maintained right to assert privilege pending appeal despite fact that he had already been convicted and sentenced); Mills v. United States, 281 F.2d 736, 741 (4th Cir. 1960) (privilege applied where defendant's time to appeal had not run and where defendant had not yet been sentenced); cf. United States v. Schwimmer, 882 F.2d 22, 25 (2d Cir. 1989); cert. denied, __U.S.__, 110 S. Ct. 1114 (1990) (testimony by defendant concerning the subject of his conviction and pending appeal conditioned on grant of use immunity); accord United States v. Bell, 902 F.2d 563, 564 (7th Cir. 1990); In re Grand Jury Proc.

Garcia-Rosell v. United States, 889 F.2d 220, 222 (9th Cir. 1989).

What plainly "prevented" Petitioner from accepting responsibility for mail fraud and perjury at his sentencing was that to do so would have required relinquishing his Fifth Amendment privilege not to incriminate himself in the event of a reversal and retrial.[5] The Second Circuit's reading

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[5] Roberts v. United States, 445 U.S. 552 (1980) has no application to this case. In Roberts, the Court held that where defendant did not affirmatively assert his Fifth Amendment privilege in declining to give cooperation which the government had "no substantial reason to believe" would be incriminating, he could not claim the imposition of a penalty on his rights. Id. at 559. By contrast here, Petitioner's acceptance of responsibility on the very facts at issue would have been obviously self-incriminating. Moreover, Petitioner made formally known his reliance on his privilege at sentencing, as reflected in his pre-sentence report: "In preservation of what are assumed to be appealable and legal issues, the (continued...)

of § 3E1.1., like that of the Sixth Circuit on the same facts in United States v. Monsour, 893 F.2d 126 (6th Cir. 1990), imposed a constitutionally impermissible penalty upon Petitioner's exercise of that privilege.

In sharp contrast, other appellate courts have correctly held in essentially the same circumstances that increasing a defendant's sentence because he does not express remorse or cooperate with the government violates his Fifth Amendment privilege. As the Court stated in United States v. Watt, 910 F.2d 587 (9th Cir. 1990):

> Under the rule we announce today, a sentencing court

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[5](...continued)
defendant has refrained from any discussions relative to his involvement in the instant offense." United States Probation Office Presentence Report, p. 7, ¶ 21.

> cannot consider against a defendant any constitutionally protected conduct. . . . Penalizing defendant for failing to provide evidence against himself or to make incriminating statements violates his constitutionally protected rights.

Id. at 592-93 (emphasis added) (applying § 3E1.1.); see also United States v. Laca, 499 F.2d 922, 927 (5th Cir. 1974) (district court improperly increased sentence on basis of defendant's failure to show repentance after conviction at trial); United States v. Safirstein, 827 F.2d 1380, 1388 (9th Cir. 1987) (district court improperly increased sentence where court concluded that defendants' failure to cooperate was evidence of lack of remorse); United States v. Heubel, 864 F.2d 1104, 1111 (3rd Cir. 1989) (vacating sentence which put defendant to "'Hobson's choice' of remaining silent

and losing the 'opportunity to be the object . . . of leniency,' or speaking and running the risk of additional prosecution.'"); United States v. Garcia, 544 F.2d 681, 685 (3rd Cir. 1976) (sentence vacated where trial court placed "price tag" on defendants' expectation of justice by offering leniency in return for information that might subject defendants to further charges).

In Thomas v. United States, 368 F.2d 941 (5th Cir. 1966), the district judge had made it clear, at sentencing after trial, that if the defendant confessed he would get a break in sentence, which would be denied him if he did not confess. Id. at 942.

The Court of Appeals vacated the sentence, holding that defendant was impermissibly forced to "suffer the

consequences" of an increased sentence because he chose to persist in the exercise of his privilege against self-incrimination. Id. at 945. The Court emphasized the importance of this privilege even at the sentencing stage:

> It must be remembered that, at the time of his allocution, Thomas had not been finally and irrevocably adjudged guilty. Still open to him were the processes of motion for new trial (including the opportunity to discover new evidence), appeal, petition for certiorari, and collateral attack. Indeed, appeal is now an integral part of the trial system for finally adjudicating the guilt or innocence of a defendant.

Id. at 945 (emphasis added).

In a variety of contexts, this Court has consistently held that the government cannot impose penalties on a defendant's exercise of his Fifth

Amendment privilege. E.g., Gardner v. Broderick, 392 U.S. 273 (1968); Uniformed Sanitation Men Ass'n v. Comm'r of Sanitation of New York, 392 U.S. 280, 284 (1968) (both invalidating statutes which authorized discharge of public employees who refused to waive Fifth Amendment protections); Simmons v. United States, 390 U.S. 377, 394 (1968) (testimony elicited at Fourth Amendment suppression hearing would not be used against defendant at trial in violation of his Fifth Amendment rights); Lefkowitz v. Cunningham, 431 U.S. 801, 807 (1977) (invalidating statute which required defendant to vacate post as political party officer for failure to give incriminating testimony); Lefkowitz v. Turley, 414 U.S. 70, 84-85 (1973) (invalidating statute which required potentially incriminating testimony to be

given in exchange for "benefit" of government contracts).

Some decisions on guidelines § 3E1.1. have attempted to circumvent the principle behind these decisions, arguing that the provision merely confers a "benefit" on those who accept responsibility rather than imposing a constitutionally impermissible penalty on those who do not. See e.g., United States v. Watt, 910 F.2d 587, 591 (9th Cir. 1990); United States v. Reed, 882 F.2d 147, 150 (5th Cir. 1989); United States v. Stephenson, 887 F.2d 57, 62 (5th Cir. 1989), cert. denied, ___U.S.___, 110 S.Ct. 1151 (1990) (denial of § 3E1.1 credit is not a penalty although it may "not infrequently. . . . factor into a forfeiture of an element of legislative grace"). These cases ignore this Court's refusal to recognize such a

distinction in the context of Fifth Amendment rights. For example, in Lefkowitz v. Turley, 414 U.S. 70 (1973), the Court considered a challenge to a statute that required a public contractor either to waive immunity from criminal prosecution when called to testify about his government contracts, or face cancellation of existing contracts and five year disqualification from future contracts. Turley, 414 U.S. at 71. The state urged that the statute did not compel testimony in violation of the Fifth Amendment, but rather merely conferred a "benefit" on contractors who chose to comply with it. Id. at 82. The Court rejected any attempt to draw such a distinction between benefit and burden -- even in the face of the state's legitimate interest in maintaining the integrity of its relations with

independent contractors. Id. at 78; see also Simmons v. United States, 390 U.S. at 394.

Any attempted distinction between "benefit" and "burden" in the context of §3E1.1. analysis is equally without merit.[6] Whether one refers to Mr. Novod as having lost the opportunity to benefit from a lighter sentence or having suffered the burden of a potentially heavier one, the effect upon him is the same.

Most importantly, the § 3E1.1. penalty imposed on a defendant's Fifth Amendment privilege at the sentencing

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[6] As the Second Circuit itself has noted, "[c]ourts squarely have rejected such a simple dichotomy. . . . [A]nalysis must focus not on the distinction between a penalty and a benefit, but instead on the nature of the right at stake." United States v. Oliveras, 905 F.2d 623, 627-28 (2nd Cir. 1990) (footnote omitted).

stage is the denial to him forever of the opportunity to convince the court that a conscientious acknowledgment of his responsibility for the offense should reduce his sentence.

In every practical sense Petitioner was penalized for exercising his right to remain silent pending Appeal. This Court should recognize the loss of opportunity for contrition for what it is: a penalty that improperly burdened Petitioner's exercise of a fundamental constitutional right.

The Court should provide a fair and rational interpretation of § 3E1.1. allowing a defendant to accept responsibility for his criminal conduct and begin his rehabilitation at any stage of the judicial process.

II.

PETITIONER WAS DEPRIVED OF HIS SIXTH AMENDMENT RIGHT TO BE TRIED "BY AN IMPARTIAL JURY OF THE STATE AND DISTRICT WHEREIN THE CRIME SHALL HAVE BEEN COMMITTED." U.S. CONST. AMEND. VI.

The Sixth Amendment to the United States Constitution guarantees a criminal defendant the right to trial "by an impartial jury of the State and District wherein the crime shall have been committed." U.S. Const. amend. VI. Petitioner Novod was denied this fundamental right because one of the jurors who decided his case was a resident of a county not within the Southern District of New York, the district in which the alleged offenses took place and in which he was tried.

The right to be tried by a jury from "the district wherein the crime

shall have been committed" was considered sufficiently fundamental to be guaranteed by constitutional amendment. Zicarelli v. Gray, 543 F.2d 466, 477 (3d Cir. 1976).[7] Indeed, its placement in the Sixth Amendment -- in the same clause with and immediately following the guarantee of an "impartial jury" --

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[7] In Zicarelli, the Court noted that although Article III of the Constitution did not contain the residence or "vicinage" requirement, Congress was sufficiently concerned about it to "give the matter serious attention at an early date." 543 F.2d at 476. The Zicarelli court traced the history of the vicinage requirement in the Sixth Amendment to a legislative committee formed to resolve disagreement over its wording. Id. at 477. The Committee eventually agreed on the language currently contained in the Sixth Amendment. Id. The Court noted that one of the "themes" that emerges from the history of the Amendment is that the requirement "[t]hat a trial take place before a jury drawn from within the state and federal judicial district in which the crime was committed was considered salient enough to be guaranteed by the Constitution." Id.

indicates the importance that the framers attached to the vicinage requirement. And, this Court has not disturbed this fundamental right.

This Court has held that a waiver of a guaranteed constitutional right may only be made in a knowing, intelligent and voluntary manner. Edwards v. Arizona, 451 U.S. 477, 482 (1981); see Sassower v. Sheriff of Westchester County, 824 F.2d 184, 190 (2d Cir. 1987); cf. Wheat v. United States, 486 U.S. 153, 108 S. Ct. 1692, 1699 (1988) (holding that in some circumstances district court may find waiver by defendant impermissible).

Moreover, waivers of fundamental Sixth Amendment rights in the Second Circuit must conform to a specific procedure laid down by the Court. United States v. Curcio, 680 F.2d 881, 888-89

(2d Cir. 1982) (waiver of right to representation by separate attorney). This procedure requires the Court to alert defendant to the risks involved in waiver of the right, to provide some reasonable time for consideration of the risks involved in the waiver of the right, and to determine through questions that the defendant understood the right and intelligently and knowingly relinquished it. Curcio, 680 F.2d at 888-89; see Edwards, 451 U.S. at 484; United States v. Moss, 562 F.2d 155, 164 (2d Cir. 1977), cert. denied, 435 U.S. 914 (1978) (defendant, not counsel, must personally waive fundamental right).

In this case, no such knowing and voluntary waiver of Mr. Novod's Sixth Amendment right was made by him. The trial court did not alert the Petitioner to the risks involved in a waiver of his

Sixth Amendment right, and did not inquire as to whether Petitioner was understandably, knowingly and voluntarily waiving it. (Trial Record, 1128) Petitioner Novod respectfully submits that his Constitutional right was per se abridged in this case because he did not knowingly and voluntarily waive the right to be tried by a jury from "the state and district wherein the crime shall have been committed." U.S. Const. amend. VI.

CONCLUSION

For the reasons set forth above, Petitioner respectfully prays that a writ of certiorari be granted to review the opinion of the Court of Appeals for the Second Circuit.

Dated: New York, New York
April 10, 1991

Respectfully submitted,

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APPENDICES

Appendix A-1

Opinion of United States
Court of Appeals on Rehearing

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

No. 1179 August Term, 1989

Petition for Rehearing submitted
on February 13, 1991

Decided: March 11, 1991

Docket No. 90-1002

----------X

UNITED STATES OF AMERICA,

Appellee,

-against-

FRANK J. SACCO, a/k/a "St. Francis Sacco," FRANK ARMENTO III, a/k/a "Robert Simone," and LEWIS NOVOD,

Defendants,

LEWIS NOVOD,

Defendant-Appellant.

----------X

Before: LUMBARD, FEINBERG and WINTER,

Circuit Judges.

Appendix A-2

Opinion of United States Court of Appeals on Rehearing

Petition for Rehearing after judgment reversing conviction on mail and wire fraud counts, and affirming conspiracy and perjury counts.

Held: Petition granted. The conviction for conspiracy is reversed and the perjury convictions are affirmed. Judgment as to the mail and wire fraud convictions remains unchanged.

BARBARA GUSS, Assistant United States Attorney, New York, N.Y. (Otto G. Obermaier, United States Attorney for the Southern District of New York, David E. Brodsky, Assistant United States Attorney, of counsel), for Appellee.

ANTHONY J. FERRARA, New York, N.Y. (Polstein & Ferrara, New York, N.Y., Robert Polstein, Joseph Bilotta, of counsel), for Defendant-Appellant.

LUMBARD, Circuit Judge:

Appendix A-3

Opinion of United States Court of Appeals on Rehearing

Lewis Novod petitions this court for a rehearing following our decision filed on January 17, 1991. United States v. Novod, 923 F.2d 970 (2d Cir. 1991). We reversed Novod's convictions for mail and wire fraud, but affirmed his conspiracy and perjury convictions. We grant Novod's petition for a rehearing, and reverse the conspiracy conviction and affirm the perjury convictions. The judgment as to the mail and wire fraud convictions remains unchanged.

The fraud and conspiracy convictions were based on Novod's participation in a scheme by Frank Sacco and Frank Armento to obtain a state dumping permit under false pretenses. The evidence at trial established that Novod, an attorney,

helped conceal from the New York State Department of Environmental Conservation (NYSDEC) that Sacco and Armento controlled a corporate applicant, Disposal Enterprise Corp. (DEC), for a permit to operate a dumpsite. After trial, Novod appealed his convictions on seven counts of perjury, six counts of mail fraud, seven counts of wire fraud, and one count of conspiracy. We reversed the mail and wire fraud convictions pursuant to United States v. Schwartz, 924 F.2d 410 (2d Cir. 1991), which held that a permit to export goods was not "property" within the meaning of the mail and wire fraud statutes. 18 U.S.C. §§ 1341, 1343 (1988). In light of our disposition of the mail and wire fraud

counts, Novod argues that the conspiracy and perjury convictions should also be reversed.

In submitting the conspiracy count to the jury, Judge Broderick gave the following instruction:

> The first element, that there was a conspiratorial agreement, and in this case that is an agreement to execute a scheme to obtain property, to wit, the permit to operate the Skibitsky property, and that that was an agreement between two or more persons.

Having held that the permit was not property within the meaning of the mail and wire fraud statutes, we now conclude that the conspiracy conviction should be reversed.

Novod argues that if we reverse the conspiracy conviction, we should remand for a new trial on the perjury counts

because of the prejudicial "spillover" effect that evidence of the conspiracy had on the perjury counts. We disagree. Criminal suspects are frequently charged with multiple counts, some of which are dismissed on procedural grounds, dismissed for lack of evidence or which result in convictions that are reversed upon appeal. Federal Rule of Criminal Procedure 8(a) provides for joinder of offenses "if the offenses charged, . . . are based on the same act or transactions connected together or constituting parts of a common scheme or plan." Relief from prejudicial joinder of offenses is required by Fed. R. Crim. P. 14. Novod did not seek a severance of the perjury counts. To invoke "'retroactive

misjoinder,'" Novod must show "'compelling prejudice.'" Callanan v. United States, 881 F.2d 229, 236 (6th Cir. 1989), cert. denied, 110 S. Ct. 1816 (1990) (quoting United States v. Warner, 690 F.2d 545, 554 (6th Cir. 1982)).

Novod has not shown "compelling prejudice." The evidence of conspiracy to defraud the state of New York, as the district court held, was admissible to prove the perjury charges. The statute proscribing perjury before a grand jury, 18 U.S.C. § 1623 (1988), requires false statements before a grand jury to be made "knowingly." Evidence of the conspiracy to conceal Armenio's and Sacco's interests in DEC from the NYSDEC helped establish that Novod knew his denials of

such knowledge before the grand jury were false.

Novod contends that even if the conspiracy evidence is admissible on the perjury counts, we should remand for a new trial because the trial court did not perform on-the-record-balancing tests before admitting that evidence. Although the district court did not expressly balance the probative value of the conspiracy evidence against its prejudicial impact, see Fed. R. Evid. 403, we have held that a "'mechanical recitation of Rule 403's formula as a prerequisite to admitting evidence' is not required." United States v. Sliker, 751 F.2d 477, 487 (2d Cir. 1984), cert. denied, 470 U.S. 1058,

471 U.S. 1137 (1985) (quoting United States v. Sangrey, 586 F.2d 1312, 1315 (9th Cir. 1978)) (citations omitted). We believe it is implicit in the district court's ruling that the probative value of Novod's participation in concealing the interests of Sacco and Armento in DEC outweighed its prejudicial impact. We see no error in that ruling.

Novod also argues that his false testimony did not satisfy the materiality requirement of § 1623 because the scheme of artifice being investigated by the grand jury did not constitute a federal offense. The legitimate scope of the grand jury's inquiry extends to "any evidence which may afford valuable leads for investigation of suspected criminal

activity during the limitations period." United States v. Cohn, 452 F.2d 881, 883 (2d Cir. 1971), cert. denied, 405 U.S. 975 (1972). As we stated in United States v. Doulin, 538 F.2d 466, 470 (2d Cir.), cert. denied, 429 U.S. 895 (1976):

> Appellant's claim that neither federal grand jury before which he appeared had authority to indict him for the substantive offenses about which he has now been found guilty of lying is, even if true, beside the point. The grand jury's duty and indeed responsibility to inquire is not coterminous with its power to indict.

Regardless of whether we employ the more stringent definition of materiality of United States v. Freedman, 445 F.2d 1220, 1227 (2d Cir. 1971) ("truthful answer would have been of sufficient probative importance to the inquiry so that, as a minimum, further fruitful investigation

would have occurred") (emphasis supplied), or of United States v. Mancuso, 485 F.2d 275, 280-81 (2d Cir, 1973) ("truthful answer could conceivably have aided the grand jury investigation") (emphasis added),[1] we find that Novod's interrogation before the grand jury was material to the grand jury's investigation of racketeering offenses committed by Sacco and Armento. Consequently, Novod's testimony was subject to the sanctions for perjury.

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[1] In United States v. Demauro, 581 F.2d 50, 53 n.1 (2d Cir. 1978), we expressly left open the question of which standard applies in the context of a grand jury investigation. We do not resolve that question because we find that Novod's misstatements were material under either standard.

Appendix A-12

Opinion of United States
Court of Appeals on Rehearing

During the course of his two grand jury appearances, Novod repeatedly denied any knowledge of Sacco's and Armento's hidden interest in DEC, a fact which had been concealed from NYSDEC while DEC applied for a permit to operate a dumpsite. Truthful answers would have furthered the grand jury's investigation of illegal dumping by Sacco and Armento, who were eventually convicted of federal racketeering crimes. In addition, the grand jury was also investigating the possibility that Novod had violated 18 U.S.C. § 1962 (1988) (proscribing investment of income derived from a pattern of racketeering activities). Therefore, Novod's testimony before the

grand jury was material for the purposes of § 1623.

Novod also argues that this case should be remanded for a resentencing hearing so that he may avail himself of the two-level offense reduction for acceptance of responsibility allowed by Federal Sentencing Guidelines Section 3E1.1. We disagree. Novod is not entitled to resentencing. Although Novod raised legal challenges to the validity of the mail and wire fraud and conspiracy charges, he made no such challenge to the perjury charges. Nothing prevented him from demonstrating "a recognition and affirmative acceptance of personal responsibility" for his false grand jury testimony. Novod never acknowledged his

participation in the scheme to conceal Sacco's and Armento's interest in DEC.

In addition, there is no reason to believe that the district court would have given Novod a different sentence absent the mail and wire fraud and conspiracy convictions. Judge Broderick was aware of the possibility that McNally v. United States, 483 U.S. 350 (1987), might warrant reversal of those convictions of appeal; yet the seriousness of the perjury charges compelled him to sentence Novod to ten months of incarceration, to run concurrently with sentences from the other convictions. Thus, remand for resentencing is unnecessary.

AFFIRMED in part and REVERSED in part.

Appendix B-1

Opinion of United States Court of Appeals

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

No. 1179 August Term, 1989

Argued: May 3, 1990

Decided: January 17, 1991

Docket No. 90-1002

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UNITED STATES OF AMERICA,

Appellee,

-against-

FRANK J. SACCO, a/k/a "St. Francis Sacco," FRANK ARMENTO III, a/k/a "Robert Simone," and LEWIS NOVOD,

Defendants,

LEWIS NOVOD,

Defendant-Appellant.

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Before: LUMBARD, FEINBERG and WINTER,

Circuit Judges.

Appendix B-2

Opinion of United States Court of Appeals

Appeal from conviction on seven counts of perjury, six counts of mail fraud, seven counts of wire fraud and one count of conspiracy following a jury trial in the Southern District of New York, Broderick, J.

Held: The perjury and conspiracy convictions are affirmed. The mail and wire fraud convictions are reversed for the reasons stated in United States v. Schwartz, Nos. 90-1363, 89-1364, 89-1365 and 89-1474, slip op. at ____ (2nd Cir., Filed January 15, 1991).

Judge Feinberg concurs in a separate opinion.

BARBARA GUSS, Assistant United States Attorney, New York, N.Y. (Otto G. Obermaier, United States Attorney for the Southern District of New York, Joan McPhee, Assistant

United States Attorney, of counsel), for Appellee.

ANTHONY J. FERRARA, New York, N.Y. (Polstein & Ferrara, New York, N.Y., Robert Polstein, Joseph Bilotta, of counsel), for Defendant-Appellant.

LUMBARD, Circuit Judge:

Lewis Novod appeals his conviction on seven counts of perjury, six counts of mail fraud, seven counts of wire fraud, and one count of conspiracy following a December 1989 jury trial in the District Court for the Southern District of New York. He was acquitted of three counts of mail fraud and one count of perjury. Judge Vincent L. Broderick imposed concurrent sentences of ten months' imprisonment followed by three years' supervised release. We affirm the perjury and conspiracy counts, and

reverse the conviction on the wire and mail fraud counts.

Novod was indicted and tried for his part in assisting Frank Sacco and his nephew, Frank Armento, in their fraudulent attempt to obtain a permit to operate a waste dumpsite in New York State. Sacco and Armento owned and operated five such dumpsites throughout the State in the 1980s. In 1987, the State's Department of Environmental Conservation ("NYSDEC") closed three of those sites, located in Ramapo, Cornwall, and Tuxedo, for violations of New York environmental law. NYSDEC also required Sacco to post a $4.5 million bond for the cleanup at the tuxedo site. In 1988,

NYSDEC closed the other two sites, located in Kent and Patterson, New York.

In 1988, Sacco and Armento agreed to purchase a nineteen-acre dumpsite in Montgomery, New York for $1 million. The purchase agreement was contingent upon the transfer of the site's current dumping permit -- under which its owners were allowed to dispose of construction and demolition debris at the property -- to Sacco and Armento. Aware of their reputation with State officials because of their history of dumpsite violations, Sacco and Armento formed the Disposal Enterprise Corporation ("DEC") to conduct the purchase and thereby conceal their identities. They also enlisted Stanley Dulman and Samuel Miller to serve as

"front men," and later hired Novod as their attorney. Novod had previously represented Armento in matters related to violations at the Kent and Patterson sites.

On May 2 and 6, 1988, Novod, on DEC's behalf, mailed letters to NYSDEC stating that Dulman and Miller were the corporation's principals and that Miller would supervise the site. NYSDEC officials decided to treat the DEC application as one for a new permit instead of as one for a permit transfer and they met on May 24 with Novod and other DEC representatives. A NYSDEC attorney, Judith Ferry, expressed concerns about the application, remarking that a corporation named Athena I and

operated by Armento had recently been cited for dumping at the Montgomery dumpsite in violation of the current permit. Ferry then asked Novod and the DEC representatives whether DEC was connected in any way with Armento or Athena I. According to Ferry, "[t]he response was in the negative. All of the parties indicated they had no association with any of those individuals and, indeed, appeared unfamiliar with the names." The meeting concluded with Novod requesting an interim permit for DEC. Novod wrote to NYSDEC on May 25 stating that Miller would "assume complete supervision of this project" and that Dulman had withdrawn from his duties with DEC because of "ill health."

At a meeting in July, Ferry told Novod that Armento and Sacco had recently been found in violation of the environmental laws. She advised Novod that NYSDEC would require Miller, on DEC's behalf, to sign an affidavit stating that neither he nor DEC had any relationship with Armento or Athena I. Although, after reading the proposed affidavit, Miller was concerned about its inclusion of a statement that he had no business relationship with Armento, Novod instructed him to sign anyway. According to Miller, Novod "told me that I had no business dealing with Frank Armento, [that] I hadn't had one; and that it was no problem, to just sign [the affidavit] and mail it back to him." As submitted to NYSDEC, Miller's

affidavit was notarized by Novod's signature and notary stamp.

In September 1988, Novod testified, under subpoena, before the grand jury investigating Sacco's possible environmental violations and repeatedly denied knowledge of Sacco's and Armento's ties to DEC. For example, he stated, in response to a question, that Sacco has "no hidden interest" in DEC. He also denied that Armento had "anything to do with" DEC.

On October 7, 1988, the grand jury returned a sixteen-count indictment against Novod, Sacco and Armento. Novod was named in three of the counts, alleging mail fraud in violation of 18 U.S.C. §§ 1341 and 1342 and perjury in

violation of 18 U.S.C. § 1623. The mail fraud count alleged that the defendants used the mails "with the aim of defrauding the New York State Department of Environmental Conservation and the inhabitants of Montgomery, New York and surrounding geographical areas into awarding a lucrative permit or transfer of permit to conduct alleged construction and demolition debris dumping." Novod moved, in part, to dismiss that count because it alleged only a scheme to defraud the State of an intangible right, arguing that schemes with such objectives do not fall within the mail fraud statute as construed in McNally v. United States, 483 U.S. 350 (1987). A hearing was held

before Chief Judge Brieant on March 21, 1989.

Before the court decided Novod's motion, the grand jury found a twenty-seven-count superseding indictment against Novod on April 19.[1] Count One alleged a conspiracy to defraud the United States in violation of 18 U.S.C.§ 371; Counts Two through Ten alleged mail fraud in violation of 18 U.S.C. §§ 1341 and 1342; Counts Eleven through Seventeen alleged wire fraud in violation of 18 U.S.C. §§ 1343 and 1342; and Counts Eighteen through Twenty-Seven alleged perjury in violation of 18 U.S.C.

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[1] Sacco and Armento pleaded guilty to several of the counts in the first indictment.

§ 1623. Paragraph Two of both the mail and the wire fraud counts stated that the scheme had three objectives: (a) "to obtain, in the name of 'Disposal Enterprise Corporation,' a permit from [NYSDEC], which would have been of substantial value to Novod and others to the Grand Jury known and unknown"; (b) "to defraud New York State and residents of Montgomery, New York and other nearby areas of money and property including, among other things, funds necessary to cover, treat, clean up, and remove material from, a dumpsite in Montgomery, New York, and funds required to litigate for closure of and payment of clean-up and related costs with regard to said dumpsite" and (c) "to defraud the

United States, New Jersey, and New York of taxes." Novod pleaded not guilty, and on July 14 moved to dismiss, making the same argument on the fraud counts as in his earlier motion.

In an August 25 memorandum and order, Chief Judge Brieant dismissed two of the perjury counts but denied the motion as to the others. Addressing Novod's argument on the fraud counts, the court concluded that the indictment alleged that the scheme sought to obtain sufficiently tangible property to satisfy McNally.

At trial, pursuant to Fed. R. Crim. P. 29, Novod moved for a judgment of acquittal on the fraud counts on the same grounds already argued. After a

colloquy, Judge Broderick, to whom the case had been assigned for trial, denied the motion, stating that he would instruct the jury "that the government must prove beyond a reasonable doubt that it was the purpose of the scheme to obtain the permit through false pretenses and that as a matter of law the permit constitutes property."

Novod raises four substantive challenges to his conviction: first, that the object of the alleged conspiracy was not "property" under the fraud statutes; second, that evidence was erroneously admitted evidence relating to his co-conspirators' past environmental violations; third, that he was denied a fair trial; and fourth, that the

impaneling of a juror who resided outside the Southern District violated his sixth amendment rights.

I.

Novod contends that the district court erred by instructing the jury that it could convict solely on a finding that the scheme sought to obtain the dumping permit and by not requiring a finding that the scheme sought to cause a pecuniary loss to the State. The author of this opinion and Judge Winter disagree, but nevertheless reverse Novod's conviction as to the mail and wire fraud counts because we feel bound by United States v. Schwartz, Nos. 89-1363, 89-1364, 89-1365, and 89-1474, slip

op. at _____ (2nd Cir. ____), which held that a permit to export goods was not "property" within the meaning of the §§ 1341 and 1343. The ensuing discussion sets forth the view of the author and Judge Winter that a permit to operate a toxic waste dumpsite constitutes "money or property" under the federal mail and wire fraud statutes. Because of the disagreement of a majority of this court with the construction of the mail and wire fraud statutes in Schwartz, this opinion and the Schwartz opinion were circulated to the judges of this circuit for the purpose of deciding whether the issue should be resolved en banc. After circulation, the judges determined that the issue did not merit en banc review.

The mail fraud statute prohibits, in pertinent part, the use of the mails in furtherance of "any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises." 18 U.S.C. § 1341.[2] In McNally v. United States, 483 U.S. 350, 356 (1987), the Supreme Court held that the terms "money or property" do not include "the intangible right of the citizenry to good government." Noting the scant

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[2] The wire fraud statute, 18 U.S.C. § 1343, is substantively identical to the mail fraud statute in all relevant respects, including the "money or property" requirement. Both statutes are construed identically. See United States v. Covino, 837 F.2d 65, 71 (2d Cir. 1988).

legislative history explaining the statute and the ambiguity of the statute itself, the Court opted for a narrow reading. "Rather than construe the statute in a manner that leaves its outer boundaries ambiguous and involves the Federal Government in setting standards of disclosure and good government for state and local officials," the Court stated, "we read § 1341 as limited in scope to the protection of property rights." Id. at 360.[3]

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[3] In the wake of McNally, Congress in 1988 enacted 18 U.S.C. § 1346, which provides that "the term 'scheme or artifice to defraud' includes a scheme or artifice to deprive another of the intangible right of honest services." This provision is not applicable here.

Clarifying that holding the next term in Carpenter v. United States, 484 U.S. 19 (1987), the Court held that a scheme to purloin confidential information from The Wall Street Journal was properly prosecuted under the mail and wire fraud statutes. The "intangible nature" of the information did not "make it any less 'property' protected by the mail and wire fraud statutes," the Court reasoned, and it concluded, "McNally did not limit the scope of § 1341 to tangible as distinguished from intangible property rights." Id. at 25. McNally and Carpenter taken together establish that "property" under the statutes encompasses things, however intangible, that are currently of value to their owners. But

the cases say nothing about schemes to defraud a statement government into granting a discretionary permit. In United States v. Evans, 844 F.2d 36 (2d Cir. 1988), we addressed a scheme to deceive the United States about the true destination of arms sold to a foreign nation. The defendants, hoping to obtain the necessary government approval for the arms transfer, allegedly sought to conceal the fact that the arms were destined for Iran. According to the mail and wire fraud counts of the indictment, the "property" the scheme sought to be obtained comprised the arms themselves and the commissions from their sale. Id. at 37. Evans contended in part that the property must belong to the deceived

party, here the United States. We did not reach this question because, citing McNally's requirement that "any benefit which the Government derives from the statute[s] must be limited to the Government's interests as property holder." 483 U.S. at 359 n. 8, we concluded that "the government must show that it had some property interest in the arms," 844 F.2d at 40. We then rejected the Government's contention that it had a property interest by virtue of its ability to control the transfer of the arms to foreign states. Id. at 40-42. The interest of the Government, which neither manufactured nor owned the weapons, was only "ancillary to a regulation, not to property." Id. at 42.

See also Corcoran v. American Plan Corp., 886 F.2d 16, 20-21 (2d Cir. 1989) (New York State, as regulator, has no property interest in money stolen from private insurance companies).

Novod argues that NYSDEC's interest in the dumping permit, which it issues in an effort to control environmental waste, is similarly "ancillary to regulation." We believe, however, that the permit satisfies the requisites of "property" under the statutes. Unlike in Evans and Corcoran, Novod and his co-conspirators sought to obtain something tangible from the State. The defendants in those cases sought arms for international sale and insurance monies, and although the Government strictly regulated those

fields, the property fraudulently obtained did not belong to the Government. Rather, the property belonged to private parties; the Government's interest was solely in controlling the use of the property by those private parties and by others. In contrast, the dumping permit originates with NYSDEC; the decision whether to grant it to an applicant rests solely with the agency. By submitting to that application procedure, moreover, the applicant implies that it wants something that only NYSDEC has and can give. Without the agency's assent, the permit remains with the agency. The process is tantamount to a contractual transaction where a buyer and seller agree on a

mutually satisfactory exchange of consideration. Here, NYSDEC's offer to "sell" the permit to Novod and his co-conspirators was contingent on its first extracting from the "buyers" certain promises affecting how the permit would be used. The bargained-for exchange, in essence, would have been permit for promise.

Thus construed, the permit constitutes property within the reach of the fraud statutes. Novod would have us believe that because the State does not buy and sell the permits, and likewise does not seek a profit from their issue, it suffers no loss when it is defrauded into granting them. Although the property lost by the State is not pecuniary, it is

akin to what the Journal lost in Carpenter: the right to control a substantial "asset" central to its organizational mission. The defendants' scheme in Carpenter deprived the Journal not of any quantifiable sales revenue or profits, but of the exclusive use of the information gathered for its "Heard on the Street" column. As the Journal is in the business, in part, of conveying that information to its readers, so too is NYSDEC in the "business" of conveying regulatory permits to responsible dumpsite operators. Novod's scheme, had it succeeded, would have deprived NYSDEC of the property essential to its

performing that function.[4] Any other conclusion would be contrary to McNally's holding that a government is to be treated like any other property-holding victim under the fraud statutes.

In reaching this conclusion, we reject Novod's implicit contention that a government has no property interest in

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[4] We do not address the Government's contention that Novod's scheme, by potentially depriving the state of cleanup costs and tax revenues, thereby satisfied the property requirement. Judge Broderick refused to charge the jury on these theories of property, listed as theories (b) and (c) in the superseding indictment. Consequently, we have no occasion to decide whether, had Novod been convicted on the basis of either of those theories, the convictions would have been proper as a matter of law. Our decision is limited to the question of whether the instruction the district court did give -- the permit-as-property theory -- was proper.

the various forms of largess it bestows. The recipient of such largess has an undeniable property interest, see, e.g., Goldberg v. Kelly, 397 U.S. 254 (1970); the state's interest prior to conferring it is equally compelling. In United States v. Turoff, 701 F. Supp. 981 (E.D.N.Y. 1988), for example, the court held that New York City taxi medallions -- licenses to operate taxicabs in the City -- were "property" under the fraud statutes. Responding to the assertion that the medallions, as a form of public licensure, had no value in the government's hands, the court stated:

> The sovereign can buy and sell and manufacture and derive proceeds . . . only by virtue of the power it possesses as sovereign -- namely its police power, its power to tax, etc.

> . . . To rob the sovereign of the due exercise of that power by schemes or artifices to defraud, is to rob it of "property" as surely as the goods or chattels or money obtained from a private person by similar schemes or artifices.

Id. at 989. As the court noted, the fact that certain rights -- there, the right to operate a taxicab; here the right to operate a dumpsite -- become vested in the licensee upon conveyance by the government does not prevent the corollary conclusion that the license "originate[s] in the state" and is public property prior to being granted to a private party. Id. at 990; see also United States v. Martinez, 905 F.2d 710, 712-715 (3d Cir. 1990); United States v. Paccione, 1990 U.S. Dist. LEXIS 4984 (S.D.N.Y. Apr. 30, 1990). See generally

Reich, The New Property, 73 Yale L.J. 733 (1964).

We realize that our decision is at odds with the law in several other circuits, see, e.g., United States v. Granberry, 908 F.2d 278, 280 (8th Cir. 1990) (school bus operator permit is not "property" under the wire or fraud statutes); United States v. Kato, 878 F.2d 267, 268-69 (9th Cir. 1989) (federal pilot licenses not property before government issuance); Toulabi v. United States, 875 F.2d 122, 125 (7th Cir. 1989) (taxi drivers' license, in city government's hands, "is a promise not to interfere rather than a sliver of property"); United States v. Murphy, 836 F.2d 248, 254 (6th Cir.) ("unissued

certificate of registration [to conduct bingo games] is not property of the State of Tennessee"), cert. denied, 488 U.S. 924 (1988); but see United States v. Martinez, 905 F.2d 709, 713-15 (3d Cir. 1990) (state issued license to practice medicine held to constitute "property"). In our view, the contrary decisions misconstrue McNally and its repudiation of the "intangible rights" doctrine. Prior to that case, prosecutors regularly used the fraud statutes to combat corrupt activities aimed at depriving citizens of their intangible right to honest governmental services. See 483 U.S. at 358; id. at 362-63 n.1 (Stevens, J., dissenting). Similarly, McNally involved a public official whose corrupt acts

effectively denied the citizenry the honest service it had a right to expect. The case established that such intangible rights were not within Congress's conception of "money or property" as articulated in the statutes. Rather, the statutes embodied the "common understanding" of fraud and property, 483 U.S. at 359 -- that is, "'the deprivation of something of value by trick, deceit, chicane or overreaching,'" id. at 358 (quoting Hammerschmidt v. United States, 265 U.S. 182, 188 (1924)) (emphasis added). The Court thus reasoned that the statutes do not reach schemes to deprive the general public of honest government precisely because the "common understanding" of "property" does not

encompass vague notions of public service. However, it is quite another thing to use that reasoning, as other courts have, to hold that the statutes do not encompass schemes by private individuals to obtain a valuable license from a government agency. Had the present facts involved NYSDEC officials' corruptly denying defendants the permit they deserved, or corruptly acting in concert with them to grant the license, this case would have been nearly identical to McNally. The facts here are substantially different: Novod's scheme was plainly aimed at obtaining "something of value" from the State by deceptive means. Because the perpetrators used the mails and the wires in furtherance of

that scheme, their acts should fall within the prohibition of the federal fraud statutes.

II.

Novod contends that the district court erroneously allowed Ferry, the NYSDEC attorney and a central Government witness, to testify to Sacco's and Armento's prior violations of environmental law. Specifically, he objects to her testimony that in 1987 and 1988, NYSDEC forced Sacco to cease operations at several dumpsites in New York because of violations and that the cleanup of the Tuxedo site would cost $4.5 million. Novod objected to the testimony, arguing that it created a

"prejudicial atmosphere of guilt by innuendo." The objections were overruled. We agree with the Government that the court's rulings were proper.

First, insofar as other evidence demonstrated Novod's awareness of the prior violations, Ferry's testimony established his motive for helping Sacco and Armento obtain the permit surreptitiously. During Armento's testimony, for example, the following exchange took place:

> Q. Did you have a conversation with the defendant about the [Montgomery, New York] site?
>
> A. Yes, I did mention it to him.
>
> Q. When was that?

A. That was sometime shortly after the other sites had been closed down, and I guess it was early April.

Q. What did you tell him?

A. I told him that I had this site, and [Sacco] and I were looking to purchase it; . . . and that we were having a little bit of a problem getting the permit transferred. . . .

Q. Did you tell him what your problem was?

A. Well, I told him that the problem was going to be if [NYSDEC] knew that either myself or Frank Sacco were involved . . . the permit wouldn't be issued to us . . . because we had both by this time been blackballed by [NYSDEC].

Other testimony revealed that Novod had represented Sacco and Armento in matters relating to several of the dumpsites closed by NYSDEC because of those prior violations. Additionally, Ferry

testified that she informed Novod that Sacco and Armento had operated certain dumpsites that "had to be closed for violations" and that any involvement by them with the present application could cause it to be disapproved.

This evidence bore on Novod's motive for providing assistance to Sacco and Armento and was directly relevant to his role in the covert effort to gain the permit for the Montgomery dumpsite and to his perjury before the grand jury. As such, that evidence provided the background for Ferry's statements -- the testimony to which Novod objected -- which established initially the fact of Sacco and Armento's prior violations. As we noted recently in a similar case:

> [E]vidence of prior crimes, wrongs, or acts is admissible for any purpose other than to show a defendant's criminal propensity," as long as it is "relevant to some disputed issue in the trial" and satisfies the probative-prejudice balancing test of Fed. R. Evid. 403. . . . "Other crimes" evidence may be admitted to complete the story of the crimes charged.

United States v. Diaz, 878 F.2d 608, 615 (2d Cir.), cert. denied, 110 S.Ct. 543 (1989) (citations omitted). Moreover, where such evidence concerns the prior acts of co-conspirators, there is little danger of the prejudice envisioned by Rule 404(b), which generally bars such evidence as it pertains to a defendant's own prior acts. Id. at 616; 22 C. Wright & K. Graham, Federal Practice and Procedure § 5239 (1978 & Supp. 1990). A

balancing test to discern possible prejudice was therefore unnecessary.

Second, Ferry's testimony was admissible for the additional purpose of proving that New York would have suffered a pecuniary loss had DEC been granted the permit. As noted, the superseding indictment alleged three possible theories of "property" of which the conspirators sought to defraud the State, one of which was the clean-up costs and litigation expenses incident to the operation of the dumpsite. By seeking admission of the disputed evidence, the Government sought to prove that Sacco and Armento had previously operated such dumps unlawfully and that they would cause the State to incur the alleged

costs were they to operate the Montgomery dump in a similar fashion. Although we agree with Novod that the Government's proof of this contention was insufficient, we nonetheless find that the admission of the testimony, as the Government attempted to make sufficient proof, was proper. At the time, the court had not yet decided not to charge the jury on this theory. The court did not inform the parties that it would so charge until its ruling on Novod's Rule 29 motion, made at the close of the Government's case.

Third, we do not believe Novod was prejudiced by admission of the disputed evidence. He argues that the testimony was "inflammatory" and "highly

prejudicial" but does not convincingly demonstrate how. The evidence was relevant to show the nature and background of the activities of the conspiracy. Further, the district court was careful to strike testimony involving Sacco's other prior misdeeds that were clearly of no relevance to Novod, such as his failure to file tax returns.

Still, as Novod contends, not all of the admitted testimony concerned environmental violations of which Novod was directly aware; much of it related to his general awareness of Sacco and Armento's prior violations but did not indicate that he was aware of the specific dumpsites for which they were cited. Evidence about specific events

that Novod knew nothing about is of questionable relevance to Novod's motivation either for participating in the scheme to obtain the permit fraudulently or for covering up his clients' ties to DEC before the grand jury. Nonetheless, we are satisfied that the court did not abuse its wide discretion in allowing the testimony. "'[D]eterminations of relevance are entrusted to the sound discretion of the trial judge, and his decision will not be overturned unless he has acted arbitrarily or irrationally.'" Diaz, 878 F.2d at 614 (citations omitted). And although the court did not give a limiting instruction, the record indicates that Novod did not seek one,

Appendix C-2

Judgement of the
United States District Court

THE DEFENDANT: was found guilty on count(s): COUNT 1, 5 through 10, 11 through 17 after a plea of not guilty.

Accordingly, the defendant is adjudged guilty of such count(s), which involve the following offenses:[1]

1. Count 1: Conspiracy to commit mail and wire fraud, 18 U.S.C. 371.

2. Counts 5: through 10: Mail Fraud, 18 U.S.C. 1341 & 2.

3. Counts 11: through 17: Wire Fraud, 18 U.S.C. 1343 & 2.

The defendant is sentenced as provided in pages 2 through 6 of this Judgment.

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[1] It appears that a clerical error was made in the judgment in that it does not include Petitioner Novod's conviction for seven counts of perjury before a federal grand jury in violation of 18 U.S.C. § 1623.

Appendix C-3

Judgement of the
United States District Court

The sentence is imposed pursuant to the Sentencing Reform Act of 1984.

1. The mandatory special assessment is included in the portion of this Judgment that imposes a fine.

2. It is ordered that the defendant shall pay to the United States a special assessment of $1,050.00, which shall be due immediately.

It is further ordered that the defendant shall notify the United States Attorney for this district within 30 days of any change of residence or mailing address until all fines, restitution, costs, and special assessments imposed by this Judgment are fully paid.

Defendant's Soc. Sec. Number: 097-40-0360

Date of Imposition of Sentence: December 5, 1989

despite his previous objections to the testimony. "The established rule is that if a party objects but does not request a limiting instruction, he cannot complain of failure to give the instruction on review." 21 C. Wright & K. Graham, Federal Practice and Procedure § 5036 (1977) (footnote omitted).[5] In view of the substantial relevant evidence of Novod's knowledge of

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[5] We are unpersuaded by the Government's argument that Novod's objection to this evidence must fail because his counsel elicited similar testimony on cross-examination. As Novod points out, the evidence of Sacco and Armento's prior violations was admitted over defense objections, and once the objections were overruled and the jury heard that testimony, defense counsel had no choice but to attempt to limit its effectiveness by pursuing the objected-to topics on cross-examination.

the dumpsite operations of Sacco and Armento, the reception of this evidence does not warrant a new trial.

III.

In response to questioning during voir dire, one potential juror stated that she resided in Ulster County, which, until 1978, had been in the Southern District but since then has been part of the Northern District.[6] Neither party objected to her service, and she was impaneled and served as a juror. At the close of trial, after Judge Broderick had

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[6] Apparently the jury summons was sent to the juror's old address inside the Southern District and was forwarded to her new address in Ulster County.

completed most of his jury instructions, a Government case agent informed the court during a colloquy that Ulster County was outside the Southern District. Although the colloquy dealt with the venue of the defendant's criminal acts, not with the jurors' residences, neither party objected to the juror's impanelment or requested that she be disqualified from participating in deliberations. Following the verdict, however, Novod moved for a new trial, contending that the impanelment of the juror violated his sixth amendment right to a trial "by an impartial jury of the State and district wherein the crime shall have been committed." The court, noting that Novod failed to make a timely objection before

the jury commenced its deliberations, denied the motion.

Novod now contends that his failure to object was not a knowing and voluntary waiver of his constitutional right because his trial counsel did not realize the true boundaries of the Southern District. We agree with the district court's conclusion that the right to challenge the juror was waived. Novod did not object when the juror first identified her county of residence; nor did he do so once he became aware of the actual boundaries of the Southern District during the colloquy. Had timely objection been made prior to the jury's deliberations, the court could have substituted an alternate juror. There is

no claim that the juror was not otherwise qualified to serve. Absent some such showing of prejudice, the failure of Novod's counsel to recognize the residence issue and make a timely objection prevents Novod from raising the issue after trial and a jury verdict. See generally Davis v. United States, 411 U.S. 233 (1973); United States v. Levasseur, 816 F.2d 37, 45 (2d Cir. 1987).

IV.

Novod's contentions that he was denied a fair trial because the Government filed the superseding indictment solely to defeat his pending motion to dismiss, and that Judge Broderick violated the law of the case by disregarding a prior ruling

of Chief Judge Brieant concerning that essential element do not merit discussion.

The mail and wire fraud counts are reversed, and the perjury and conspiracy counts are affirmed.

Opinion of United States Court of Appeals

United States v. Novod
90-1002

FIENBERG, Circuit Judge, concurring:

I join in the majority's opinion except for Part I, in which the majority explains why it disagrees with this court's decision in United States v. Schwartz, Nos. 89-1363, -1364, -1365, -1474. As to Part I, I concur only in the result; unlike the majority, I agree with the analysis in Schwartz of 18 U.S.C. §§ 1341, 1343.

Appendix C-1

Judgement of the
United States District Court

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

JUDGMENT INCLUDING SENTENCE
UNDER THE SENTENCING REFORM ACT

Case Number SSSS88 CR 448 (VLB)
Filed: December 14, 1989

UNITED STATES OF AMERICA

V.

LEWIS NOVOD

ANTHONY J. FERRARA, ESQ.
Defendant's Attorney

Appendix C-4

Judgement of the
United States District Court

Defendant's mailing address: 1245 East 68th Street, Brooklyn, New York 11234

Defendant's residence address: same as above

Name & Title of Judicial Officer: VINCENT L. BRODERICK
UNITED STATES DISTRICT JUDGE SDNY

IMPRISONMENT

The defendant is hereby committed to the custody of the United States Bureau of Prisons to be imprisoned for a term of TEN (10) MONTHS.

The Court makes the following recommendations to the Bureau of Prisons:

> Defendant is to surrender to the United States Marshal under 18 U.S.C. 3143 B3. Surrender deferred until 14 days after the affirmance of the conviction by the Court of Appeals. . .
>
> Bail Continued and bail conditions remain in effect.

Appendix C-5

Judgement of the
United States District Court

SUPERVISED RELEASE

Upon release from imprisonment, the defendant shall be on supervised release for a term of THREE (3) YEARS. The first SIX (6) MONTHS of supervised release the defendant shall be confined to his home.

While on supervised release, the defendant shall not commit another Federal, state, or local crime and shall comply with the standard conditions that have been adopted by this court (set forth on the following page). If this judgment imposes a restitution obligation, it shall be a condition of supervised release that the defendant pay any such restitution that remains unpaid at the commencement of the term of

supervised release. The defendant shall comply with the following additional conditions:

Until fines are paid the defendant will not incur any credit charges or open up any lines of credit without the approval of the Probation Officer.

Defendant will provide the Probation Officer with access to any financial information the Officer request [sic].

STANDARD CONDITIONS OF SUPERVISION

While the defendant is on probation or supervised release pursuant to this Judgment:

1. The defendant shall not commit another Federal, state or local crime;

2. the defendant shall not leave the judicial district without the permission of the court or probation officer;

3. the defendant shall report to the probation officer as directed by the court or probation officer and shall submit a truthful and complete written report within the first five days of each month;

4. the defendant shall answer truthfully all inquiries by the probation officer and follow the instructions of the probation officer;

5. the defendant shall support his or her dependents and meet other family responsibilities;

6. the defendant shall work regularly at a lawful occupation unless excused by the probation officer for schooling, training, or other acceptable reasons;

7. the defendant shall notify the probation officer within seventy-two hours of any change in residence or employment;

8. the defendant shall refrain from excessive use of alcohol and shall not purchase, possess, use, distribute, or administer any narcotic or other controlled substance, or any paraphernalia

related to such substances, except as prescribed by a physician;

9. the defendant shall not frequent places where controlled substances are illegally sold, used, distributed, or administered;

10. the defendant shall not associate with any persons engaged in criminal activity, and shall not associate with any person convicted of a felony unless granted permission to do so by the probation officer;

11. the defendant shall permit a probation officer to visit him or her at any time at home or elsewhere and shall permit confiscation of any contraband observed in plain view by the probation officer;

12. the defendant shall notify the probation officer within seventy-two hours of being arrested or questioned by a law enforcement officer;

13. the defendant shall not enter into any agreement to act as an informer or a special agent of a

law enforcement agency without the permission of the court;

14. as directed by the probation officer, the defendant shall notify third parties of risks that may be occasioned by the defendant's criminal record or personal history or characteristics, and shall permit the probation officer to make such notifications and to confirm the defendant's compliance with such notification requirement.

These conditions are in addition to any other conditions imposed by this Judgment.

FINE WITH SPECIAL ASSESSMENT

The defendant shall pay to the United States the sum of $4,050.00, consisting of a fine of $3,000.00 and a special assessment of $1,050.00.

Appendix C-10

Judgement of the
United States District Court

These amounts are the totals of the fines and assessments imposed on individual counts, as follows: $50.00 Special assessment of each of 21 Counts.

**FINE: $3,000.000. This sum shall be paid as follows: during supervised release on a schedule fixed by and supervised by and subject to modification by the Probation Officer.

STATEMENT OF REASONS

The Court adopts the recommendations in the presentence report as to the applicable guideline factors. (See Statement of Reasons in attached transcript).

Appendix C-11

Judgement of the
United States District Court

Guideline Range Determined by the Court:

Total Offense Level: 12

Criminal History Category: I

Imprisonment Range: 10 to 16 months

Supervised Release Range: 2 to 3 years

Fine Range: $3,000 to $30,000.

(Plus $1,210.05 cost of imprisonment and $91.66 cost of supervision)

$1,050.00 special assessment.

Sentence imposed is within the guideline range.